IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5821 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 & 2 YES; 3 to 5 NO

JM TRIVEDI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 5821 of 1989

MR AM RAVAL for Petitioners

MS SONAL D VYAS AGP for Respondent No. 1

MR DG CHAUHAN for Respondent No. 2

MR BP TANNA for Respondent No. 3-10

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 03/05/2002

C.A.V. JUDGEMENT

1. By this petition under Article 226 of the

Constitution, ten Deputy Executive Engineers have called into question fixation of their seniority in the final seniority lists dated 8.5.1984 and 10.1.1985 of the respondent No.2 Board. After filing of the petition in August 1989, it came to be admitted in January 1991 fixing the date of final hearing on 18.4.1991. Thereafter, the petition appears to have been listed for final hearing in the year 1999 and, after being once dismissed for default in the year 2000, came to be finally argued now. By now, all the petitioners have been promoted to the higher posts and three of them have already retired while one has occupied the highest promotional post of Chief Engineer.

2. After being recruited on lower posts, the petitioners were, between December 1977 and December 1978, expressly posted on the promotional post of Deputy Engineer until further orders and appointed to officiate as Deputy Engineer (Civil) on "purely temporary, provisional and ad-hoc basis without prejudice to the rights of their seniors, if any, and subject to regularisation afterwards when the seniority issue is finalised".

2.1 Originally, the petitioners were allocated to the respondent Board from the service of the respondent No.1-State which, in exercise of its powers under Article 309 of the Constitution, made Rules to provide for regulating recruitment to the post of Deputy Engineer (Civil) (Public Health Engineering Service Class II) vide Notification dated 25.6.1976. The said Rules provided for appointment on the post of Deputy Engineer by promotion and by direct selection in the ratio of 3:1. And, following the said Rules, the respondent assigned seniority to the Deputy Engineers on the basis of the ratio prescribed for them according to the Rota system.

Accordingly, in the seniority list dated 18.5.1984 the petitioners' names were shown below the direct recruitees who were appointed for the first time on or after 15.4.1980 as against the petitioners appointed as above on the promotional post on ad-hoc and temporary basis in the year 1977-78. One direct recruitee was shown above three promotees irrespective of the date of appointment.

2.2 The petitioners claim to have individually made representations against the final seniority lists. However, the first collective representation appears to have been made on 23.6.1988 after the final seniority list was operated for promotion to the post of Executive Engineer on 12.5.1988. The Government rejected the

representation vide its letter dated 10.2.1989 and that briefly covers the journey of facts upto the filing of the petition.

3. Challenging the seniority lists made as above, the petitioners have prayed for directions to refix their seniority on the basis of the date of their appointment on the post of Deputy Engineer and to confer upon them the benefits of deemed date of promotion to the higher post from the date their immediate juniors were promoted along with the consequential benefits. The petition was resisted by the respondents which include the direct recruitees benefitted by the seniority lists. They opposed, on the grounds of delay and laches, and with equal force, on the ground that the final seniority lists were proper and legal despite apparent anomaly of the directly recruited engineers pushing down the seniors in the seniority lists. By an affidavit-in-reply filed on behalf of the respondent No.2, it is submitted that the seniority list is in accordance with the rules and the petitioners initial appointment on the promotional post of Deputy Engineer should be considered to be fortuitous and the employees would become members of the service only from the date of their appointment in accordance with the Rules. It is further averred by another affidavit of the Deputy Secretary that the same recruitment rules have been uniformly applied in respect of 30 vacancies that occurred in 1977, 28 vacancies that occurred in the year 1978 and 5 vacancies that occurred in the year 1979. By a belated affidavit executed and filed in April 2002, it is stated on behalf of the State Government that the seniority was fixed on the basis of the Rota system in the ratio of 3:1 and the petitioners had not raised any objection against the provisional or final seniority list made as on 18.5.1984. The first objection by some of the petitioners were raised by a letter dated 28.6.1988. All objections were considered by the State Government as reflected in the minutes dated 17.1.1989. It is further averred that the process of direct recruitments was started by the State Government in the year 1977 through the G.P.S.C. to fill up 15 posts of Deputy Engineers. Thereafter, the process of examinations and interviews was completed by the end of the year 1979 and appointments by direct recruitment were made since April 1980. In the meantime, the Government promoted the petitioners on purely temporary, provisional and ad-hoc basis until further orders to see that the work of the department did not suffer on account of non-availability of direct recruitees.

4. Learned counsel for the petitioners, Mr.A.M.Rawal

submitted, on the point of delay, that there was in fact no delay insofar as the petitioners had approached the Court as soon as their representations were turned down by a laconic order dated 10.2.1989. He further submitted that the delay, if any, since the finalisation of the seniority lists, could not be attributed to any indolence on the part of the petitioners since they were making representations and awaiting a favourable resolution. And, in any case, the petitioners ought not to be non-suited, after admission and prolonged pendency of the petition, only on the ground of delay. The learned counsel relied upon the judgment of this Court in KUMBHAR YAKUB JUSAB v. BHUJ MUNICIPALITY [1991 (2) GLR 755], wherein relevant observations which were emphasized are:

> "20.....I do not think the petition can be thrown out only on the ground of delay and laches. Municipal election is not a matter of enforcement of personal or individual right, but it is a matter of public concern and the holding of such an election validly and fairly in due compliance with the statutory requirements is a matter in which the public at large have vital interest. If there is no legal reservation of seats for Schedules Caste candidates by rotating the same from Ward Nos.6 and 9 to Ward Nos.5 and 10 there is going to be an illegality and when such an illegality is pointed out to the Court, it would be the duty of the Court to see that the illegality is cured and the election is held thereafter. The Municipality duly elected functions for a period of five years. Municipal election is not a matter of momentary importance. The legal constitution of Municipal Board is a matter which vitally concerns the inhabitants of Municipal borough..... I am of the opinion that since the petition is already admitted and the process of election was at least halted for a few days by ad interim relief issued by the Court and when the challenge raised in the petition is one which is substantial and squarely covered by the decision of this Court, it would not be fair and proper to me (sic) to throw out the petition on the ground of delay and laches. I, therefore, overrule the objection of Mr.Nanavati, learned advocate for respondents Nos.4 to 22."

5. The learned counsel for the respondent relied upon the following observations of the Supreme Court as early as in the year 1974 in P.S.SADASIVASWAMY v. STATE

OF TAMIL NADU [AIR 1974 SC 2271]:

"2.....Not only respondent No.2 but also respondents 3 and 4 who were the appellant's juniors became Divisional Engineers in 1957 apparently on the ground that their merits deserved their promotion over the head of the appellant. He did not question it. Nor did he question the promotion of his juniors as Superintending Engineers over his head. He could have come to the Court on every one of these three occasions. A person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters. The petitioner's petition should, therefore, have been dismissed in limine. Entertaining such petitions is a waste of time of the Court. It clogs the work of the Court and impedes the work of the Court in considering legitimate grievances as also its normal work. We consider that the High Court was right in dismissing the appellant's petition as well as the appeal."

(emphasis added)

6. The observations as under of the Apex Court in B.S.BAJWA v. STATE OF PUNJAB [(1998) 2 SCC 523] were also relied upon:

"7. Having heard both sides we are satisfied that the writ petition was wrongly entertained and allowed by the Single Judge and, therefore, the judgments of the Single Judge and the Division Bench have both to be set aside. The undisputed facts appearing from the record are alone sufficient to dismiss the writ petition on the ground of laches because the grievance was made by B.S.Bajwa and B.D.Gupta only in 1984 which was long after they had entered the

department in 1971-72. During this entire period of more than a decade they were all along treated as junior to the other aforesaid persons and the rights inter se had crystallized which ought not to have been reopened after the lapse of such a long period. At every stage others were promoted before B.S.Bajwa and B.D.Gupta and this position was known to B.S.Bajwa and B.D.Gupta right from the beginning as found by the Division Bench itself. It is well settled that in service matters the question of seniority should not be reopened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This alone was sufficient to decline interference under Article 226 and to reject the writ petition."

(emphasis added)

7. On the merits of the petitioners' claim, the learned counsel on both sides practically relied upon different aspects of the same line of judgments on the issue of seniority arising from application of quota and rota rule. Recent judgment of the Apex Court, referring most of the earlier judgments on the issue, in SURAJ PRAKASH GUPTA v. STATE OF JAMMU & KASHMIR [(2000) 7 SCC 561], was relied upon with particular emphasis on the observation that-

"81. This contention, in our view, cannot be accepted. The reason as to why this argument is wrong is that in service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not borne in the service. This principle is well settled. In N.K.Chauhan v. State of Gujarat [(1977) 1 SCC 308 at para 32] Krishna Iyer, J. stated:

Later direct recruits cannot claim deemed date of appointment for seniority with effect from the time when direct recruitment vacancy arose. Seniority will depend upon length of service.

Again, in A.Janardhana v. Union of India [(1983) 3 SCC 601] it was held that a later direct recruit cannot claim seniority from a date before his birth in the service or when he was in school

or college. Similarly it was pointed out in A.N.Pathak v. Secretary to the Government (1987 Supp SCC 763 at p.767) that slots cannot be kept reserved for direct recruits for retrospective appointments."

8. The above decision in para 81 of the judgment is in respect of point No.4 wherein the question of direct recruits claiming appointment from the date of vacancy in quota before their selection was raised. The background of the issue can be found in para 80 which reads as under:

"80. We have next to refer to one other contention raised by the respondent direct recruits. They claimed that the direct recruitment appointment can be ante-dated from the date of occurrence of a vacancy in the direct recruitment quota, even if on that date the said person was not directly recruited. It was submitted that if the promotees occupied the quota belonging to direct recruits they had to be pushed down, whenever direct recruitment was made. Once they were so pushed down, even if the direct recruit came later, he should be put in the direct recruit slot from the date on which such a slot was available under the direct recruitment quota."

The confusion is created because of mixing of the issue of ante-dating the date of appointment with a place in the seniority list. This would be clear from para 79 of the said judgment wherein the position is succinctly summarised as under:-

"79. Summarising the position, we therefore hold that the ad hoc/stopgap service of the promotees cannot be treated as non est merely because PSC was not consulted in respect of continuance of the ad hoc/stopgap service beyond six months. Such service is capable of being regularised under Rule 23 of the J&K (CCA) Rules, 1956 and rectified with retrospective effect from the date of occurrence of a clear vacancy in the promotion quota, subject to eligibility, fitness and other relevant factors. There is no "rota" rule applicable. The "quota" rule has not broken down. Excess promotees occupying direct recruitment posts have to be pushed down and adjusted in later vacancies within their quota, after due regularisation. Such service outside

> the promotee quota cannot count for seniority. Service of the promotees which is regularised with retrospective effect from the date of vacancies within the quota counts for seniority. However, any part of such ad hoc/stopgap or even regular service rendered while occupying the direct recruitment quota cannot be counted. Seniority of the promotees or transferees is to be fixed as per quota and from the date of commencement of probation/regular appointment as stated above. Seniority of direct recruits is from the date of substantive appointment. Seniority has to be worked out between direct recruits and promotees for each year. We decide Point No.3 accordingly."

8.1 What stands out from the above extraction of the relevant ratio from SURAJ PRAKASH (supra), heavily relied upon for the petitioners, is that, in the facts of that case, there was no rota rule and the quota rule had not broken down. And, in line with the earlier judgment of the Larger Bench of the Supreme Court in N.K.CHAUHAN v. STATE OF GUJARAT (infra), excess promotees occupying direct recruitment posts were held to be liable to be pushed down and adjusted in later vacancies within their quota after due regularisation. It is clearly held that such service outside the promotees' quota could not be counted for seniority. Even in case services of the promotees were regularised with retrospective effect, any part of ad-hoc, stopgap or even regular service rendered while occupying direct recruitment quota cannot be counted. It is further clearly held that seniority of the direct recruits is from the date of substantive appointment.

8.2 In N.K.CHAUHAN v. STATE OF GUJARAT & OTHERS [AIR 1977 SC 251], relied upon for the respondents, the Government was held to be within its powers under the relevant rule to promote mamlatdars beyond their quota under the "as far as practicable" clause. And, for such promotions, seniority was held to be dependent on the length of continuous officiating service and could not be upset by later arrivals from the open market save to the extent to which any excess promotees would have to be pushed down. It was clearly held that appointees on an ad-hoc basis are never clothed with any rights and have to quit when the exit time arrives. It is also held that for the period during which the quota and rota rules strictly applied, promotees who had been fitted into vacancies beyond their quota, the year being regarded as the unit, must suffer survival as invalid appointees

acquiring new life when vacancies in their quota fell to be filled up. To that extent, they were required to step down, rather be pushed down, as against direct recruits who were later but regularly appointed within their quota.

9. Applying the above relevant ratio in the facts of the present case, it could be first seen that neither the quota rule was made relaxable in the recruitment rules nor had that rule broken down. Instead, the Government was taking steps to fill up the posts by following the quota rule by initiating the selection and recruitment process and promotees like the petitioners were expressly appointed on ad-hoc and temporary basis subject to regularisation afterwards. Thus, at the time of finalisation of the seniority list, they were liable to be pushed down and placed below the direct recruits, the posts in whose quota they were temporarily occupying on provisional and ad-hoc basis. Admittedly, their appointments were regularised afterwards. And, what was granted to the direct recruits as their due under the quota and rota rules was not an advanced date of appointment on the post but only a higher place in the seniority list. And, fixation of seniority of direct recruits vis-a-vis promotees by interpolating direct recruits at appropriate places in the seniority lists finds support in the ratio of the judgment of the Supreme Court in SURJIT SINGH v. UNION OF INDIA reported in AIR 1997 SC 2693.

9.1 Presumably to meet with the above situation, it was contended on behalf of the petitioners that seniority, even under the quota and rota rules, disregarding the date of actual appointment on the post, could have been given only on year to year basis although no rule to that effect was cited. It is held in that regard in N.K.CHAUHAN's case (supra) that by applying and operating the quota rule, it is open to the Government, subject to tests under Article 16 of the Constitution, to choose "a year" or other period or the vacancy by vacancy basis to work out the quota among the sources. Once the Court is satisfied, on examining the constitutionality of the method proposed, that there is no invalidity, administrative technology may have a free play in choosing one or the other of the familiar processes of implementing the quota rule. It is observed that, "We, as Judges, cannot strike down the particular scheme because it is unpalatable to forensic taste".

10. The reliance of the petitioners on the judgment of the Apex Court in G.S.LAMBA AND OTHERS v. UNION OF

INDIA AND OTHERS [AIR 1985 SC 1019] was misplaced, insofar as in the facts of that case, promotions were made in excess of the quota for years and such promotees on substantive vacancies held the post for over eight years, the promotions were not temporary, ad-hoc or stopgap and direct recruitment was not made for years. That was held to be clearly amounting to non-implementation of the quota rule or malfunctioning thereof and yet the rota being adhered to, and it was held to be unjust, unfair and inequitous being violative of Articles 14 and 16.

11. The recent Constitution Bench judgment of the Supreme Court in RUDRA KUMAR SAIN AND OTHERS v. UNION OF INDIA AND OTHERS [(2000) 8 SCC 25] was relied upon by the petitioners in support of the proposition that inter-se seniority between direct recruits and promotees should have been determined on the basis of length of service and not on the basis of the service rules. In the facts of that case, the promotees' case was that they were recruited to the higher judicial service under the recruitment rules after due consultation and/or approval of the High Court and were duly qualified for being promoted and had continuously held the posts of Additional District and Sessions Judges and yet the High Court erroneously treated them to be ad-hoc or fortuitous or stopgap appointees and, therefore, made them juniors to the direct recruits ignoring their continuous length of service for the purpose of determining the seniority. It was held that an error was committed by excluding the persons on the ground that they held the posts on ad-hoc basis or for fortuitous reasons or by way of stopgap arrangement even though their appointments were made under the rules after due consultation and/or approval of the High Court. The Court, in that case, was only concerned with the question whether in preparing the seniority list of the officers recruited to the higher judicial service from both the sources viz. as direct recruits as well as by promotion, prior to the amendment of 1987, the directions and the conclusions of the Court in SINGLA case [(1984) 4 SCC 450] had been duly given effect to. The argument was that if a quota post meant for a direct recruit according to the quota remains unfilled, then the promotee occupying the last post must be taken to be holding the post on ad-hoc basis or for fortuitous reasons or by way of a stopgap arrangement and the promotee holding the last post must be made to surrender it. In the context of that controversy, it was held by the Court as under:

"19. The meaning to be assigned to these terms

while interpreting provisions of a service rule will depend on the provisions of that rule and the context in and the purpose for which the expressions are used. The meaning of any of these terms in the context of computation of inter se seniority of officers holding cadre post will depend on the facts and circumstances in which the appointment came to be made. For that purpose it will be necessary to look into the purpose for which the post was created and the nature of the appointment of the officer as stated in the appointment order. If the appointment order itself indicates that the post is created to meet a particular temporary contingency and for a period specified in the order, then the appointment to such a post can be aptly described as "ad hoc" or "stopgap". If a post is created to meet a situation which has suddenly arisen on account of happening of some event of a temporary nature then the appointment of such a post can aptly be described as "fortuitous" in nature. If an appointment is made to meet the contingency arising on account of delay in completing the process of regular recruitment to the post due to any reason and it is not possible to leave the post vacant till then, and to meet this contingency an appointment is made then it can appropriately be called as a "stopgap" arrangement and appointment in the post as "ad hoc" appointment".

"20. In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be "stopgap or fortuitous or purely ad hoc". In this view of the matter, the reasoning and basis on which the appointment of the promotees in the Delhi High Judicial Service in the case in hand was held by the High Court to be "fortuitous/ad-hoc/stopgap" are wholly erroneous and, therefore, exclusion of those appointees to have their continuous length of service for seniority is erroneous."

11.1 The above ratio does not take the petitioners' case any further, since the quota rule in the present case cannot be in any way said to have been broken down and their appointment on the promotional post was

expressly and from the very beginning genuinely on purely temporary, provisional and ad-hoc basis.

12. Several judgments were cited by the learned counsel on both sides on the question of binding effect of the judgments of the Supreme Court in case of inconsistency in the dicta. The illusion of inconsistency was created by taking a blinkered view of some of the observations in N.K.CHAUHAN and SURAJ PRAKASH cases (supra). However, on a conjoint reading of both the judgments and reading of the particular observations in their context repels the illusion of any inconsistency. Therefore, that issue is not required to be probed any further.

13. In the result, it is held that upon application and coming into operation of the recruitment rules called the Deputy Engineer (Civil) (Public Health Engineering Service Class II) Recruitment Rules, 1976 a fixed inflexible quota rule was prescribed and the same could not be operated without complying with an implicit rota rule in the making of seniority list. The direct recruits were not assigned any date of appointment prior to the date they were borne on the cadre but, by the seniority list in question, a higher place in the seniority was granted to meet the requirement of quota and rota rule inscribed in the recruitment rules. The petitioners were not shown to have a vested or legally recognized right for being promoted from the date on which they were provisionally appointed to officiate on the promotional post and their regularisation on the promotional post was expressly subject to finalisation of the seniority lists. The petitioners had practically accepted the seniority lists for more than five years and the making of representations by any one or more of them during that period could hardly cure the vice of delay and laches in view of the judgments cited hereinabove in that regard. Therefore, the petition deserves to be dismissed on merits as well as on the grounds of delay and laches. Accordingly, it is dismissed and Rule is discharged with no order as to costs.

Sd/-

(D.H.Waghela, J.)

(KMG Thilake)